UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-11300-RWZ

TEXTILE RUBBER & CHEMICAL COMPANY, INC.

v.

TILLOTSON CORPORATION and
JOHN G. ALDEN, INC.

MEMORANDUM AND ORDER

May 24, 2007

ZOBEL, D.J.

I. Background

In 1909, John G. Alden started a business in Boston designing and selling boats. He was very successful and the name Alden became a well-known and respected name in the boat world. It is now, nearly a century later, at the center of a series of lawsuits, third-party claims and counterclaims. The principal issue underlying this series of cases and claims concerns the rights that one or more of the entities engaged in the several transactions have in the Alden name. On this issue the record is not entirely clear and the answer is not unequivocal.

For half a century, until his death in 2001, Neil Tillotson and Howard Howalt were friends and business partners. Tillotson ran Tillotson Corporation in Massachusetts and Howalt ran Textile Rubber & Chemical Company in Georgia. The men owned stock in each other's companies and sat on each other's boards of

directors. Tillotson is a large diversified holding company; Textile is a diversified, multi-national manufacturing company. At some time John G. Alden, Inc. (hereafter "JGA"), became a wholly-owned subsidiary of Tillotson. Later, either Tillotson or JGA formed another corporation, John G. Alden of Massachusetts (hereafter "JGAM"), which became a wholly-owned subsidiary of JGA. Both Alden corporations[1] used the Alden name in their boat design and sales business. The record is unclear which entity owned the names and marks at various times, and the provenance of such rights are nowhere in the record explained.

In 1990, JGA sold all of its shares of JGAM to Textile. According to the complaint, Textile purchased the shares and assets, including specifically the right to use and license the Alden name.

Between 1990 and 1996, Textile manufactured and sold boats under the Alden name. In 1996, it transferred to a new entity under a lease/purchase agreement the assets of the boat building division, including, specifically, its rights to the Alden name derived through its ownership of JGAM. The new entity continued the boat business as Alden Yachts Corporation ("AYC"). It freely used and advertised the Alden name.

In 1998, pursuant to a Stock Purchase Agreement, Neil Tillotson sold back to Textile all shares he then owned of that company. At the same time, Textile sold back to Tillotson all shares of JGAM.

A. Prior Litigation

[1] A third Alden corporation, John G. Alden Insurance Agency, Inc., was wholly owned by Tillotson. It is peripheral to the events in issue.

Tillotson appears to take the position that Textile did not separately acquire rights to the Alden name by purchasing JGAM, or that such rights reverted to Tillotson when it reacquired JGAM. In any event, JGAM asserts that it owned the trademarks but that it granted no rights to Textile or, through Textile, to AYC. True to this position, JGAM, in 2000, sued AYC for infringement of the Alden trade name, which claim was settled with a grant by JGAM to AYC of a license for the use of "Alden Yachts." AYC allegedly did not confine its use to the limits of the license and in 2003, JGAM sued again. This time, AYC filed a third-party claim against Textile in which it asserted a breach of warranty of title of the Alden name and marks arising from the 1996 lease purchase agreement. Again, the JGAM/AYC dispute settled, but the third-party action was tried to a jury which determined that Textile did not have title to the Alden name and marks and thus found a breach of the warranty. It rendered a verdict for AYC on liability and the court entered judgment against Textile in the agreed amount of $608,000. See Alden Yachts Corp. v. Textile Rubber & Chemical Co., Inc., 03-cv-10263-RWZ (D. Mass. May 26, 2006) (Docket # 113).

B. Complaint and Pending Motion

The, hopefully, last instalment of this lengthy dispute is the current lawsuit by Textile against Tillotson and JGA to recover the damages paid to AYC. The complaint alleges breach of the 1990 contract for the sale of JGAM stock and assets to Textile by failing to include JGAM's intellectual property (Counts 1 and 4), misrepresentation by stating in 1990, that JGAM owned the Alden name and marks (Counts 2 and 5), misrepresentation by reaffirming in 1996, in connection with the sale of the marks to

AYC, that Textile had good title thereto (Counts 3 and 6), and indemnification (Counts 7 and 8). Plaintiff has withdrawn Count 9 for contribution. Defendants have moved to dismiss on several grounds. (Docket # 4.)

II. Discussion

A. Release

The 1998 Stock Purchase Agreement (that governed the sale of Textile stock by Tillotson back to Textile) includes a broad General Release of all claims Textile "now has (even if not presently known to [Textile]) or ever had from the beginning of the world to the Closing Date against [Tillotson and JGA] ...." (Docket # 5, Mem. in Supp. of Defs.' Mot. to Dismiss, Ex. D, Stock Purchase Agreement, 7(c)). The parties agree that the Closing Date was April 28, 1998, and that the release language applies to claims that existed before that date. They differ as to whether the claims in issue did then exist or whether they came into existence thereafter. As set forth in the complaint, Textile contends that its claims arose upon defendants' disavowal of their transfer of title to the Alden names, which disavowal occurred for the first time, and unbeknownst to Textile, in 2000. The second time defendants allegedly violated their 1990 agreement was in 2003 when they brought suit against AYC, which, in turn, claimed against Textile that year. Textile contends that, contrary to defendants' arguments, the operative facts that gave rise to the instant claims were not the promises made before 1998, but the breaking of those promises in 2000 or 2003. Therefore, the release does not, by its terms, defeat this lawsuit.

The court is unable to resolve the issue on a dispositive motion, as the issue of

the asserted breach of contract is muddy on the state of this record. In particular, the record does not permit a conclusion about the terms of the contract, or the nature and conduct of the alleged breach. Glaringly absent are any facts about whether the 1990 contract transferred the intellectual property rights. Accordingly, the motion to dismiss is denied with respect to the contract claims, Counts 1 and 4.

2. Statute of Limitations

The parties agree that plaintiff's contract claim is subject to a six-year statute of limitations, see Mass. Gen. Laws ch. 260 § 2, and that the misrepresentation counts are governed by a three-year statute, see Mass. Gen. Laws ch. 260 § 2A. Again they disagree when these claims accrued. As noted above, it is unclear whether and when the contractual breach occurred. Thus, the court cannot conclude that such claims are time-barred.

The misrepresentation counts, however, are on a different footing. They are barred if the date of the representation (latest, 1996) is dispositive; even if discovery of the misrepresentation (latest, June 2003) is deemed to be the operative date, discovery occurred more than three years before submission of this case.[2] Plaintiff tries to avoid this result by arguing equitable tolling on the ground that it tried to bring the misrepresentation and breach of contract claims into the 2003 lawsuit by a fourth-party complaint in August 2004. The motion was denied. But that ruling did not prevent

[2] In its brief in support the motion to amend its answer and file a fourth-party complaint, Textile suggests yet another date of discovery. It stated that on July 21, 2004, Grafton Corbett, an officer of JGA and Tillotson, testified that JGAM did not own the trademarks and name at the time Textile purchased the stock of JGAM. That date, too, predates the filing of the instant action by more than three years.

Textile from filing a separate action at that time rather than two years later. The motion to dismiss is allowed as to all misrepresentation claims, Counts 2, 3, 5 and 6.

3. Indemnification

Plaintiff acknowledges that it has found no Massachusetts case in which contractual indemnification has been implied. But it suggests that there existed among these parties unique factors and special relationships that support Textile's claims to be indemnified for damages it suffered at the instance of these closely related defendants. See Araujo v. Woods Hole, Martha's Vineyard, 693 F.2d 1, 2-3 (1st Cir. 1982) ("a contractual right to indemnification will only be implied when there are unique special factors . . . or when there is a generally recognized special relationship between the parties"). However, if a special relationship existed here, it was that of Mr. Tillotson and Textile, but Mr. Tillotson, individually, is not a party and has not ever been a party to any contracts among the several parties. The motion to dismiss is allowed as to Counts 7 and 8.

III. Conclusion

Defendants' Motion to Dismiss (Docket # 4) is ALLOWED as to the misrepresentation and indemnification claims (Counts 2, 3, 5, 6, 7 and 8) and DENIED as to the contract claims (Counts 1 and 4).

May 24, 2007
DATE

/s/Rya W.Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE